Supreme Court, U.S.
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90-1421

No. _____

In the Supreme Court of the United States

October Term, 1990

INDEPENDENT SCHOOL DISTRICT NO. 4 OF TULSA COUNTY, OKLAHOMA,

Petitioner,

v.

NATALIE JOHNSON, BY AND THROUGH FRED AND JENNIFER JOHNSON, HER FATHER AND MOTHER, AS NEXT FRIENDS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 11, 1991

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QUESTIONS PRESENTED

The respondent Natalie Johnson is a disabled child who receives appropriate special education and related services from the petitioner School District during the regular 180-day school year. Natalie benefits from the regular school year program. She does not have a history of regression during breaks from school.

The questions presented are:

(1) Whether a regression/recoupment analysis is appropriate to determine whether a disabled child needs more than 180 days of educational services per year to benefit from her education.

(2) Whether a disabled child who benefits from special education and related services provided during the regular school year and has no history of regression during school breaks is eligible for extended school year services.

(3) Whether the court of appeals erred by remanding this case for further proceedings when it found that the respondent failed to satisfy her burden of showing that she needs extended school year services to benefit from her education.

LIST OF PARTIES

The parties before this Court are the petitioner, Independent School District No. 4 of Tulsa County, Oklahoma and the respondent, Natalie Johnson, by and through Fred and Jennifer Johnson, her father and mother, as next friends. The parties to the proceedings before the United States Court of Appeals for the Tenth Circuit were the petitioner, the respondent, the Oklahoma State Department of Education and the Children's Developmental Center.

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INDEPENDENT SCHOOL DISTRICT NO. 4 OF TULSA COUNTY, OKLAHOMA,

Petitioner,

v.

NATALIE JOHNSON, BY AND THROUGH FRED AND JENNIFER JOHNSON, HER FATHER AND MOTHER, AS NEXT FRIENDS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Independent School District No. 4 of Tulsa County, Oklahoma (the "School District") seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 921 F.2d 1022, and is reprinted in the appendix to this petition ("Pet. App.") at 1a. The opinion of the United States District Court for the Northern District of Oklahoma is not reported. It is attached at Pet. App. 20a. The opinions of the Oklahoma State Department of Education Hearing and Appeal Officers are not reported. They are attached at Pet. App. 28a and 24a, respectively.

JURISDICTION

The court of appeals entered judgment on December 11, 1990. The School District invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) (Supp. 1990).

STATUTES INVOLVED

The statutory provision involved in this case is the Individuals with Disabilities Education Act (the "IDEA"), formerly titled the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400-1485 (1990).

STATEMENT OF THE CASE

The respondent Natalie Johnson ("Natalie") is an 11-year-old girl, residing with her parents (the "Johnsons") within the School District's legal boundaries. Natalie is mentally retarded with autistic traits and seizures. She has attended the Children's Developmental Center (the "Developmental Center"), a special education cooperative of which the School District is a member, since she began school at the age of 18 months.

In April, 1987, Natalie's IEP team discussed and denied the Johnsons' request for extended school year services. On July 14, 1987, the Johnsons requested a due process hearing to consider an educational program with related services for Natalie during the summer.

At the administrative hearing, the Johnsons presented the testimony of Harriet Fisher, a social worker, and Jennifer Johnson, Natalie's mother.[1] The Johnsons also introduced two letters prepared by Fisher. The first letter, dated April 30, 1987, stated that "Without a structured summer opportunity, [Natalie] will experience regression from her current functioning." R. Vol. II. Fisher wrote the letter after only one or two 30 to 45-minute visits with Natalie. R. Vol. II, tr. at 26, 28. Over the summer of 1987, Fisher had approximately three more short visits with Natalie. R. Vol. II, tr. at 14-15, 24-25. After these visits, Fisher concluded, in a second letter dated August 3, 1987, that "Without a full calendar year of program, Natalie will regress each summer to a total vegetative, dependent level." R. Vol. II. At the hearing, however, Fisher testified that Natalie had not regressed in any of the areas in which they had "worked" together. Fisher had no opinion whether Natalie had regressed in any other areas. R. Vol. II, tr. at 31, 18.

The Johnsons also introduced letters from two pediatricians, Drs. Barber and Rubin, and an evaluation prepared

[1] The Johnsons also presented evidence concerning the inclusion of the Developmental Center as a necessary party to the proceeding. Although the administrative hearing officer did not rule on this issue, the administrative appeal officer held that the Developmental Center was not a proper party to the administrative proceedings. The district court determined that it need not rule on the issue. The court of appeals held that the Developmental Center was not a necessary party.

by Dr. Mobley, a psychologist. Barber's letter, dated May 14, 1987, stated that "[Natalie] would, in all likelihood, regress over the summer in self help skills necessary for maximizing her independence . . . ." R. Vol. II. Barber did not explain how he drew this conclusion or offer an opinion as to Natalie's ability to recoup lost skills. The Johnsons did not call Barber to testify or themselves testify to the frequency or scope of his contact with Natalie.

Rubin's letter, dated May 7, 1987, stated that "[Natalie] would benefit from an extended structured program through the summer." R. Vol. II. Rubin expressed no opinion regarding Natalie's loss of skills without summer school services.

Mobley's psychological evaluation of Natalie was based upon a parent interview and one 90-minute observation of Natalie. As to summer services, the evaluation stated only that "[I]t seems important that some kind of structured teaching program be available to her in the summer months." R. Vol. II. Mobley expressed no opinion as to Natalie's loss of skills without summer programming. She did not discuss Natalie's educational needs or progress with anyone at the Developmental Center.

Mrs. Johnson testified that Natalie did not attend a structured educational program during the summers of 1986 or 1987. During the summer of 1987, Natalie attended a nonstructured recreational camp without educational programming or therapy. R. Vol. II, tr. at 68-70.

The School District presented the testimony of Developmental Center employees Jan Oswalt and Linda Barton. Oswalt worked with Natalie in the areas of speech and language development during the 1985-86 and 1986-87 school

years. R. Vol. II, tr. at 88. Barton was Natalie's special education classroom teacher during the 1985-86 and 1986-87 school years. R. Vol. II, tr. at 98-99. Both Oswalt and Barton testified that, in their experience with Natalie, she suffered no regression or loss of skills in any area during breaks from school. R. Vol. II, tr. at 89-90, 96, 99, 101. The School District's documentary evidence demonstrated that Natalie progressed as the result of special education and related services provided by Oswalt and Barton during the regular school year. R. Vol. II.

On December 11, 1987, the administrative hearing officer, using a regression/recoupment analysis, held that the educational program offered to Natalie by the School District was appropriate and that it need not provide extended school year services to her during the summer of 1988. The hearing officer, who was the only decision maker to see the witnesses testify, simply found the School District's evidence more persuasive. On March 9, 1988, the administrative appeal officer affirmed the hearing decision. Natalie timely appealed the administrative decision to the United States District Court for the Northern District of Oklahoma.[2] Pursuant to the IDEA, the district court received the record of the administrative proceedings. The parties did not submit additional evidence to the court. Both Natalie and the School District filed motions for summary judgment.

[2]In the district court action, Natalie also named as defendants the Developmental Center and the Oklahoma State Department of Education to address the issue of necessary parties.

On May 4, 1989, the U.S. Magistrate issued a Report and Recommendation, stating that Natalie was entitled to 40 days of summer school from the School District during the summer of 1989. On June 5, 1989, the district court rejected the magistrate's recommendation and entered judgment for the School District. The district court held that the School District had fully complied with all requirements of state and federal law in educating Natalie.

The court of appeals reversed and remanded, holding that the administrative record did not contain sufficient facts to enable either the administrative officers or the court to make an informed disposition of the case. It found that the parties erred by focusing on a regression/recoupment analysis to the exclusion of other factors and remanded the case for a "multifaceted inquiry". Pet. App. at 17a. In a footnote, the appeals court also found that conflicting evidence of regression and recoupment made the district court's grant of summary judgment inappropriate. Pet. App. at 16a.

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant this writ because the decision of the court of appeals misapplies the *Rowley* analysis in the context of extended school year eligibility. In addition, the decision conflicts with the decisions of four circuit courts of appeals, numerous district courts and administrative hearing officers and the official policy of the Office of Special Education Programs. Finally, the Court should grant this writ because the issues presented affect the

educational programs provided to millions of handicapped students.

PROPOSITION I

A.

The court of appeals misunderstood the purpose of extended school year services and, therefore, rejected an appropriate eligibility analysis.

The School District is required to provide Natalie with a free appropriate public education. 20 U.S.C. § 1412(1). In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court concluded that a state satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The instruction and services must be provided at public expense, meet the state's educational standards, approximate the grade levels used in the state's regular education and comport with the child's IEP. Furthermore, the IEP and the child's personalized instruction must be formulated in accordance with the requirements of the IDEA. If the child is educated in the regular classroom, the IEP and personalized instruction should be reasonably calculated to enable the child to achieve passing grades and to advance from grade to grade. *Id.* at 203-04.

The Court also held that, in reviewing administrative decisions under section 1415(e)(2) of the IDEA, the reviewing court must conduct a two-pronged inquiry. First, did the state comply with the procedures set forth in the IDEA? Second, is the IEP developed through the IDEA's procedures

reasonably calculated to enable the child to receive educational benefits? *Id.* at 206-07. "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *Id.* at 207. Under *Rowley*, the School District must comply with the IDEA's procedures and provide Natalie an individually designed program of special education and related services from which she can benefit educationally. If the School District has done so, it has satisfied its obligations.

The first component of the *Rowley* test has never been an issue in this case. At the initial due process hearing, the parties stipulated that all requirements of state and federal law had been satisfied. Thus, the only question for decision was whether Natalie needed extended school year services to receive educational benefit.

In *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990), the Sixth Circuit explored the relationship between the regression/recoupment analysis and the "some educational benefit" standard:

> If the child benefits meaningfully within his potential from instruction under a proper IEP over a regular school year, then ESY service may not be required under the Act unless "the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an [ESY]." In the latter circumstance, "the educational program offered by the School District [will] not meet the 'some educational benefit' standard of Rowley." *Id.* at 1473 (quoting *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158-59 (5th Cir. 1986)).

The regression/recoupment analysis determines whether the child's educational benefit will be "significantly jeopardized" without an extended school year. First, consider the disabled child who, because of the nature and severity of her disability, does not regress over school breaks or who regresses, but recoups lost skills within a reasonable time. Because she retains skills previously learned and has the opportunity to master new ones, she receives educational benefit from a regular school year program. Therefore, she is not entitled to extended school year services.

On the other hand, consider the child who, during school breaks, suffers regression so severe or substantial that lost skills cannot be reasonably recouped. Since she must spend an unreasonable amount of time relearning lost skills, her opportunity to master new skills is reduced and her educational benefit impaired. She *is* eligible for extended school year services.

The court of appeals did not understand the purpose of extended school year services: to target children who cannot achieve educational benefit without additional services. The regression/recoupment analysis, considered in conjunction with the nature and severity of the child's disability, accurately and objectively pinpoints these children through the use of simple documentation. The court of appeals' "multifaceted inquiry" adds nothing but confusion to a straightforward, individualized analysis and can be interpreted to require extended school year services for children who receive educational benefit without them.

The court of appeals also failed to understand another

important point. *No one* insists that the only adequate evidence of extended school year need is a history of actual regression. Parents need not withhold extended school year services from their children in an effort to collect data showing actual regression. If predictive evidence demonstrates that a child will suffer severe or significant regression without an extended school year, then services are necessary.

However, when evidence of the child's reaction to a recent summer without educational services is available, it will often be the most reliable indicator of his or her need for services during the following summer. The evidence in this case demonstrated that Natalie was without educational services during the two summers immediately preceding the due process hearing. The evidence also demonstrated that she did not regress over either summer. The Johnsons' evidence of regression consisted of two predictions, by individuals without knowledge of Natalie's educational needs and progress, that Natalie would regress without extended school year services. The historical evidence, showing no regression, revealed these predictions to be pure speculation.

The administrative record demonstrates Natalie's educational progress and includes neither empirical evidence nor persuasive predictive evidence of regression. In fact, the uncontradicted evidence demonstrated *no actual regression* over two summers immediately preceeding the hearing. Natalie clearly achieves educational benefit from a regular school year program. The School District has satisfied its obligations under *Rowley*.

B.

The court of appeals' decision conflicts with the decisions of four circuit courts of appeals, numerous district courts and administrative hearing officers.

There are more than eight million children with disabilities in the United States today. Each one is potentially eligible for some type of extended school year services. Because of the tremendous number of eligible children and the need to consider eligibility on a yearly basis, certainty and uniformity in the decision making process are essential. The court of appeals' decision eliminates those all-important qualities from the process.

The court of appeals claims support for its "multi-faceted inquiry" from the decisions of other circuit courts of appeals. Its claims of support, however, are greatly exaggerated. Four circuit courts of appeals addressing the extended school year issue have found that eligibility is determined through a regression/recoupment analysis.

The early cases arose as challenges under the IDEA and other federal statutes to the refusal of some states to fund more than 180 days of public education for their handicapped students. The Courts of Appeals for the Fifth, Eighth and Eleventh Circuits affirmed district court decisions finding 180-day rules incompatible with the IDEA. Those decisions were based exclusively upon the tendencies of disabled children to regress over school breaks and their frequent inability to recoup lost skills quickly. *See Yaris v. Special School District,* 558 F. Supp. 545 (E.D. Mo. 1983), *aff'd,* 728 F.2d 1055 (8th Cir. 1984); *Georgia Association of Retarded Citizens v. McDaniel,* 716 F.2d 1565 (11th Cir. 1983), *remanded on other grounds,* 468 U.S. 1213 (1984), *reinstated*

in relevant part 740 F.2d 902 (11th Cir. 1984), *cert. denied,* 469 U.S.1228 (1985); *Crawford v. Pittman,* 708 F.2d 1028 (5th Cir. 1983).[3]

The Courts of Appeals for the Fifth and Sixth Circuits faced the eligibility question directly. In *Alamo Heights,* 790 F.2d at 1153, the Fifth Circuit focused exclusively on regression and recoupment to determine whether a student achieved "some educational benefit" without extended school year services. *Id.* at 1159. Since he did not, extended school year services were appropriate. *Id.* In *Rettig v. Kent City School District,* 539 F. Supp. 768 (N.D. Ohio 1981), *aff'd in pertinent part and partially vacated,* 720 F.2d 463 (6th Cir. 1983), *cert. denied,* 467 U.S. 1201 (1984), the district court found that the student would be eligible for extended school year services if the services would prevent significant regression of skills or knowledge that would seriously affect his progress toward self-sufficiency. 539 F. Supp. at 778-79. Because the administrative record did not contain persuasive evidence of the student's regressive tendencies, the court found the

[3] In *Battle v. Pennsylvania,* 629 F.2d 269 (3d Cir.), *on remand,* 513 F. Supp. 425 (E.D. Pa. 1980), *cert. denied,* 452 U.S. 968 (1981), the Third Circuit also used a regression/recoupment analysis to strike down Pennsylvania's 180-day rule. However, the district court in *Armstrong v. Kline,* 476 F. Supp. 583 (E.D. Pa. 1979), the decision *Battle* reviewed, found that a student is entitled to extended school year services if "regression caused by an interruption in educational programming, together with the student's limited recoupment capacity, renders it impossible or unlikely that the student will attain the level of self-sufficiency and independence from caretakers that the student would otherwise be expected to reach in view of his/her handicapping condition." Although the Third Circuit found that self-sufficiency and independence were not the IDEA's goals, *Battle* neither explicitly adopted nor rejected the *Armstrong* standard. Thus, the *Armstrong* standard is frequently cited as "good law" within the Third Circuit.

student ineligible for extended school year services. *Id.* at 779. The Sixth Circuit affirmed, holding that extended school year services "were not necessary to permit Thomas to benefit from his instruction." 720 F.2d at 466 (footnote omitted); *see also Cordrey*, 917 F.2d at 1460, 1473-74 (finding *Rettig* consistent with the IDEA and with *Rowley*).

In addition to its conflict with these decisions, the court of appeals' opinion also conflicts with the decisions of several district courts and administrative hearing officers. *See, e.g., Bales v. Clarke*, 523 F. Supp. 1366, 1371 (E.D. Va. 1981) ("Plaintiff is also not entitled to year-round schooling without showing an irreparable loss of progress during summer months.") *Garrity v. Gallen*, 522 F. Supp. 171, 240 (D.N.H. 1981) (eligibility depends upon showing "that interruption of the program of an educationally handicapped child would result in severe and substantial harm and regression and would have the effect of negating the benefits of such educationally handicapped child's regular special education program"); *Anderson v. Thompson*, 495 F. Supp. 1256, 1266 (E.D. Wis. 1980) (student is ineligible because she "will not suffer irreparable loss of progress during a break in her educational programming"), *aff'd*, 658 F.2d 1205 (7th Cir. 1981) (affirming district court denial of compensatory damages and attorney's fees); *Jefferson County Board of Education*, 16 EHLR 970, 972-73 (SEA Ala. 1990) (using regression/recoupment analysis required by Alabama special education guidelines); [No case name], 1985-86 EHLR Dec. 507:384, 385-86 Case No. SE-41-85 (SEA Ill. 1985) (citing *Georgia Association, Crawford* and *Battle* as support for regression/recoupment analysis); *W. V. v. Cranford Board of Education*, 1988-89 EHLR Dec. 401:179, 185,

Case No. EDS 4789-88 (SEA N.J. 1988) ("With regard to the extended school year issue, case law suggests that the proper standard is whether denial of services during the summer will lead to substantial regression."). The court of appeals' decision rejecting the regression/recoupment analysis in favor of a "multifaceted inquiry" not only stands alone and unsupported, it also places the Tenth Circuit Court of Appeals in direct conflict with four other circuit courts of appeals.

C.

The decision also conflicts with the official policy of the Office of Special Education Programs.

Congress established the Office of Special Education Programs ("OSEP"), within the Office of Special Education and Rehabilitative Services in the Department of Education, as the principal agency in the Department for administering and carrying out the IDEA. 20 U.S.C. § 1402(a) (1990). In this role, OSEP frequently prepares policy letters in response to questions from parents, legislators and educators concerning the IDEA's requirements. Recently, OSEP prepared two policy letters in response to questions regarding extended school year eligibility and programming.[4] In the first, OSEP acknowledged that the IDEA does not specify the circumstances in which an extended school year is needed or establish standards for extended school year programs. However, it also stated that, "Under most State rules regarding extended school year programs for children with handicaps, the *fundamental concern is that the ex-*

[4]The text of these policy letters is set forth in full at Pet. App. 40a and 44a.

tended school year services be designed to address regression and recoupment problems." Pet. App. 42a (emphasis added). In the second policy letter, OSEP stated that *"[T]he purpose of the ESY program is to prevent regression and recoupment problems."* Pet. App. 46a (emphasis in original). Clearly, OSEP believes that extended school year eligibility depends upon the individual child's tendency to regress and ability to recoup. The court of appeals' attempt to inject other issues into the eligibility question conflicts with OSEP's official policy and creates unnecessary confusion in a previously settled area of the law.

PROPOSITION II

The court of appeals' decision blurs the necessary distinction between eligibility for extended school year services and the appropriate program and placement for eligible students.

The court of appeals' decision reflects a basic misunderstanding of the two-part decision making process necessary to decide extended school year issues. During the first step of this process, the child's IEP team decides whether the child is eligible for extended school year services by using a regression/recoupment analysis in light of the nature and severity of the disability. If the child does not lose learned skills during breaks from school or can recoup the lost skills within a reasonable time after classes resume, then extended school year services are not necessary to enable the child to benefit educationally. The child, therefore, is ineligible for extended school year services, and the IEP team's inquiry is complete. However, if the child loses learned skills during breaks and cannot recoup those skills within a reasonable time after classes resume, then extended school

year services are necessary to enable the child to benefit educationally. *That* child is eligible for extended school year services. Therefore, the IEP team must undertake the second component of the decision making process.

During the second part of the process, the IEP team decides the type of program and the placement that will reduce or eliminate the child's loss of skills and enable him or her to achieve educational benefit. To make this decision, team consideration of the factors outlined in the court of appeals' decision, and other available information, is appropriate. *See* Pet. App. !6a, n. 9. This information is irrelevant to the eligibility decision. However, by utilizing the information at *this* point in the process, the team can better determine the appropriate length for the child's summer program, its content and location.

In this case, the IEP team began the two-part decision making process by determining Natalie's eligibility for extended school year services. Because the team determined that Natalie did not lose learned skills during breaks from school, it found her ineligible for services. The administrative hearing and appeal officers and the district court, using a regression/recoupment analysis, also found her ineligible. Because it misunderstood the two-step decision making process, the court of appeals rejected the regression/recoupment analysis and required that the decision makers consider eligibility and program/placement together. That decision is wrong.

Since Natalie has consistently been found ineligible for extended school year services, *no one* has yet considered the appropriate length, content and location of a summer program for her. If Natalie is found eligible for extended school

year services, then her IEP team will conduct the multi-faceted inquiry demanded by the court of appeals. However, the inclusion of these factors as part of the eligibility decision simply confuses the team's analysis of educational benefit by adding irrelevant considerations.

CONCLUSION

The regression/recoupment analysis, adopted by OSEP and courts and lawmakers nationwide, is simply the best measure of extended school year eligibility. The court of appeals' decision creates an irreconcilable conflict with the decisions of four circuit courts of appeals, numerous district courts and administrative hearing officers. Because of the significance of the conflict and the impact of this issue upon millions of disabled children, parents, educators and administrative and judicial decision makers, the School District respectfully requests the Court to grant this petition for writ of certiorari.

Respectfully submitted,

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ROBERT L. HOECKER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 89-5111

NATALIE JOHNSON, a minor who sues by and through FRED and JENNIFER JOHNSON, her father and mother, as next friends,

Plaintiff-Appellant,

v.

INDEPENDENT SCHOOL DISTRICT NO. 4 OF BIXBY, TULSA COUNTY, OKLAHOMA; OKLAHOMA STATE DEPARTMENT OF EDUCATION; CHILDREN'S DEVELOPMENTAL CENTER,

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 88-C-340-C)

Lowell Thomas Price, Jr., of Protection & Advocacy Agency, Tulsa, Oklahoma, for Plaintiff-Appellant.

Andrea K. Allbritton, of Rosenstein, Fist & Ringold, Tulsa, Oklahoma (John G. Moyer, Jr. with her on the briefs), for

Defendant-Appellee Independent School District No. 4 of Bixby, Tulsa County, Oklahoma and Defendent-Appellee Children's Development Center.

Kay Mildren, with her on the briefs, Oklahoma State Department of Education, Oklahoma City, Oklahoma, for Defendant-Appellee Oklahoma State Department of Education.

Before HOLLOWAY, MOORE, and BRORBY, Circuit Judges.

PER CURIAM.

This case involves an action brought under the Education of All Handicapped Children's Act, 20 U.S.C. §§ 1400-1485 (1989), as implemented by 34 C.F.R. §§ 300.1-300.754 (1989) collectively referred to as "the Act"). Natalie Johnson is a severely and multiply handicapped child who was eight years old at the time her local school district rejected her parents' request for a structured summer educational program. Natalie's parents invoked the due process provisions of the Act, and the schools' decision was administratively and judicially affirmed. There are two issues on appeal: (1) What information should be considered as a basis for entitlement under the Act to a free extended year school program in addition to the traditional September through May nine-month school program? (2) In Oklahoma, is the cooperative special education service provider a necessary party to the due process procedure mandated by the Act? As to the first issue, we reverse the district court's grant of summary judgment in favor of the schools because insufficient information was utilized in both the administrative pro-

ceedings and the district court to satisfy the Act's procedural requirement for individualized review of Natalie's program plan. As to the second issue, we conclude that the special education cooperative unit is a not necessary party to this action.

I.

It is undisputed that Natalie has profound autistic defenses with at least moderate mental retardation and seizures. She has received educational services since the age of eighteen months from the Children's Development Center (CDC), a cooperative special education program serving severely and multiply handicapped children from several local county school districts, administered by the Superintendent of the Tulsa County Public Schools.[1] Natalie and her family are legal residents within the Independent School District No. 4 of Bixby, Tulsa County, Oklahoma

[1]The cooperative provision of services is statutorily approved by Okla. Stat. tit. 70, § 13-101 (1989 & Supp. 1990), which provides in pertinent part:

> Two or more school districts may establish cooperative programs of special education for exceptional children when such arrangement is approved by the State Board of Education. The county superintendent of schools of any county may establish and maintain a special education program, with the approval of the State Board of Education, and county funds may be expended for such purpose. Any school district or districts located wholly or in part in a county may participate in any such program so established by the county superintendent of schools and shall have authority to contribute school district funds, either directly or by reimbursement to the county participating in such program. . . .
>
> It shall be the duty of each school district to provide special education for all exceptional children as herein defined who reside in that school district. This duty may be satisfied by:
>
> . . . .
>
> 2. The district joining in a cooperative program with another district or districts to provide special education for such children . . . .

(the Bixby school district), which is, in turn, a member of the CDC cooperative program. CDC operates for nine months of the year, September through May. The Bixby school district does not provide a structured summer program for its severely and multiply handicapped children.

During the nine months of the regular school year, Natalie attended the CDC. For four years, 1982-1986, she attended a recreational day camp for handicapped children run by the Tulsa Association for the Retarded (TAR) during six weeks in the summer. The parties dispute whether this day camp experience had a positive educational effect on Natalie or whether it was tantamount to no structured educational program.

In January 1987, at the regular annual meeting held to plan Natalie's educational program, the Johnsons requested that Natalie be provided with a structured summer educational program. This request was denied after a separate meeting was held in April 1987 to discuss the issue. The Johnsons then invoked the due process procedures defined by the Act, beginning with a hearing before an administrative hearing officer appointed by the Oklahoma State Department of Education.

At the hearing, the Johnsons presented evidence in the form of testimony from Natalie's mother and from the social worker for Natalie's family, R. Vol. II, tr. at 9-33, 58-85, as well as written opinions from her pediatrician, her neurologist, and a psychologist who evaluated Natalie. R. Vol. II. All agreed that she needed to continue her experience in a structured educational setting during the summer months to prevent regression.

The school district presented testimony from Natalie's classroom teacher and her speech therapist for the 1985-86 and 1986-87 school years. Both teachers testified that, in fact, Natalie had not regressed during the summer of 1986 even though she had not participated in an extended school year

program during that period. R. Vol. II, tr. at 89-90, 99-101.

The hearing officer found that Natalie's educational record did not provide objective documentation of improvement or lack of regression, despite her teachers' optimistic testimony. R. Vol. II, Hearing decision, findings of fact, ¶¶ 7, 8. The hearing officer concluded that an extended school year program was not warranted for Natalie. The hearing officer's decision was based, first, on the legal premise that predictions of future regression are insufficient to compel the schools to provide an extended school year to a handicapped child, and, second, on the factual finding that Natalie's parents failed to demonstrate that Natalie had in fact regressed during the summer of 1986.

Natalie's parents appealed the decision, and the appeals officer affirmed the hearing officer's decision, stating that "[a]ll parents are encouraged to supplement their children's required education in an effort to maximize the individual child's potential; but, this additional effort is not the School's responsibility." R. Vol. II, Appeal Review Decision at 3.

Natalie's parents then filed this action against the Bixby school district, the CDC and the Oklahoma State Department of Education (collectively referred to as "the schools") in the district court for the Northern District of Oklahoma, seeking judicial review of the decision. No additional evidence was offered by either party and the matter was referred to a magistrate following cross motions for summary judgment. The magistrate issued a report and recommendation stating that the preponderance of the evidence indicated that Natalie could be predicted to regress during the summer months without a structured summer program, and concluding that, pursuant to the Act, the schools must provide Natalie with a structured summer educational program as a continuation of her program during the regular school year. R. Vol. I, tab 27.

However, the district court, basing its decision on the

same regression evaluation standard used by the administrative hearing officer, found the evidence that Natalie had not regressed during the previous summer, presented by two teachers who had worked with Natalie on a daily basis for many months, to be more compelling than the predictions of outside experts, who had less continuous contact with the child, that such a summer program would prevent regression in the future. The district court therefore granted the schools' motion for summary judgment, holding that, as a matter of law under the Act and the Oklahoma statute, the Bixby school district was not required to provide an extended school year program to Natalie. Johnson v. Independent School District No. 4, No. 88-C-340-C (N.D. Okla. June 5, 1989). Natalie's parents appealed.

II.

This court has jurisdiction on appeal pursuant to § 1415(e) of the Act, and 28 U.S.C. § 1291 (1989). *See also Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 186 n. 9 (1982) (the court has jurisdiction over an issue which evades review yet is capable of repetition).

The final district court order in this case was grant of the schools' motion for summary judgment.

> We review the summary judgment orders *de novo*, applying the same legal standard used by the district court under Rule 56(c) of the Federal Rules of Civil Procedure. Summary judgment should be granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When applying this standard, we are to examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. However, the nonmoving party may not rest on his pleadings; the party must set forth specific facts showing that there is a genuine issue for trial.

Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230 (10th Cir. 1990) (citations omitted).

In *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court established a twofold inquiry for district courts to use in determining whether the Act's requirements have been met: (1) Has the State complied with the procedures set forth in the Act? (2) Is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Id.* at 206-07.

The legal standard to be used by the district court in considering each of these issues is set forth in the Act: "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of the party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2); *see Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989).[2] This case was submitted to the district court on the administrative record, including a

[2]The court in *Campbell v. Talladega County Board of Education*, 518 F. Supp. 47 (N.D. Ala. 1981), explained that:

> The preponderance of the evidence standard codified at 20 U.S.C. § 1415(e)(2) reflects a decision to accord a greater role in the enforcement scheme to the federal courts. The original House version which provided that the determination of the state agency would be "conclusive in any court of the United States if supported by substantial evidence" was rejected by the conference committee and the present language was substituted.

Id. at 53 n. 9 (citation omitted); *see also David D. v. Dartmouth School Comm.*, 775 F.2d 411, 420 (1st Cir. 1985) (federal courts do not have to assume deference to the administrative hearing officers' decisions under the Act, for to do so would be tantamount to elevating the decisions of the administrative hearing officer to that of the highest state court, clearly an inappropriate outcome), *cert. denied sub nom. Massachusetts Dept. of Educ. v. David D.*, 475 U.S. 1140 (1986).

transcript of the administrative hearing. Thus, our review includes *de novo* factual analysis based on that administrative record, as well as *de novo* legal analysis of the issues presented.

The parties should note that the burden of proof in these matters rests with the party attacking the child's individual education plan. In *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153 (5th Cir. 1986), the Fifth Circuit reiterated that the Act

> "placed primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parents." In deference to this statutory scheme and the reliance it places on the expertise of local education authorities, . . . the Act creates a "presumption in favor of the education placement established by [a child's individualized education plan]," and "the party attacking its terms should bear the burden of showing why the educational setting established by the [individualized education plan] is not appropriate."

Id. at 1158 (quoting *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd,* 468 U.S. 883 (1984)) (footnotes omitted).

III.

States which elect to receive federal funds under the Act must provide all handicapped children with the right to a "free appropriate public education." 20 U.S.C. § 1412(1). Under the Act, each child's substantive educational program must be defined by an annual individual educational plan (IEP) developed by the local school district in consultation with the child's parents. 34 C.F.R. §§ 300.340-.345. The IEP must include the specific goals, teaching methods, and evaluation procedures appropriate to that child's educational needs. *Id.* § 300.346. Each child's IEP must be revised at an annual meeting of the teachers and therapists who work with the child, his or her parents, and local school district special education administrators (IEP meeting). *Id.* §§

300.341-.345. If the child's special education placement or program as defined by the IEP is disputed by the child's parents, the Act sets forth a procedure by which the IEP is to be reviewed by an impartial hearing officer through the administration of the state education agency. 20 U.S.C. §§ 1415(a), (b), (d); 34 C.F.R. §§ 300.500-.508. The decision of the hearing officer may be appealed to an appeals hearing officer, also appointed by the state educational agency. 20 U.S.C. § 1415(c); 34 C.F.R. §§ 300.509 - .510. That decision may be reviewed in an action brought in state court or in the local federal district court. 34 U.S.C. § 1415(e); 34 C.F.R. § 300.511.

We are bound by the Act, which rests on the cornerstone of granting handicapped children entitlement to a "free appropriate public education," 20 U.S.C. § 1412(1), based on an individually designed education plan revised at least annually, *Id.* at § 1414(a)(5); *Rowley*, 458 U.S. at 203. The individualization requirement is of paramount importance in the Act. 20 U.S.C. §§ 1401(a)(19), 1412(2)(B); *Rowley*, 458 U.S. at 188-89, 198, 202; *Polk*, 853 F.2d at 172; *Battle v. Pennsylvania*, 629 F.2d 269, 280 (3d Cir.), *on remand*, 513 F. Supp. 425 (E.D. Pa. 1980), *cert. denied sub nom. Scanlon v. Battle*, 452 U.S. 968 (1981). While it would be easier for those involved in administrative review under the Act to have one and only one criterion for evaluating the appropriateness of a handicapped child's IEP, the handicapping impediments which force individualization of the child's education program in the first place also mandate an individualized approach to review of the child's IEP.

The amount of regression suffered by a child during the summer months, considered together with the amount of time required to recoup those lost skills when school resumes in the fall, is an important consideration in assessing an individual child's need for continuation of his or her structured educational program in the summer months. In *Alamo Heights*, the Fifth Circuit explained this "regression-recoupment" analysis, which plays an integral part in the

case before us today:

> As we stated in *Crawford v. Pittman* [703 F.2d 1028 (5th Cir. 1983)], "The basic substantive standard under the Act, then, is that each IEP must be formulated to provide some educational benefit to the child," in accordance with "the unique needs" of that child. The some-educational-benefit standard does not mean that the requirements of the Act are satisfied so long as a handicapped child's progress, absent summer services, is not brought "to a virtual standstill." Rather, if a child will experience severe or substantial regression during the summer months in the absence of a summer program, the handicapped child may be entitled to year-round services. The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months.

790 F.2d at 1158 (citations omitted).

However, the regression-recoupment analysis is not the only measure used to determine the necessity of a structured summer program. In addition to degree of regression and the time necessary for recoupment, courts have considered many factors important in their discussions of what constitutes an "appropriate" educational program under the Act. These include the degree of impairment and the ability of the child's parents to provide the educational structure at home, *Battle*, 629 F.2d at 280; the child's rate of progress, his or her behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with non-handicapped children, the areas of the child's curriculum which need continuous attention, and the child's vocational needs, *Yaris v. Special School Dist.*, 558 F. Supp. 545, 551 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984); and whether the requested service is "extraordinary" to the child's condition, as opposed to an integral part of a program for those with the child's condition. *Polk*, 853 F.2d at 182. In fact, the Third Circuit recently explicitly rejected

using solely a regression analysis to determine the necessity of a summer program under the Act:.

> [A] serious problem . . . lies in defendants' implicit suggestion that a child must first show regression before his parents may challenge the appropriateness of his education . . . [W]e do not believe that Congress intended that courts present parents with the Hobson's choice of allowing regression (hence proving their claim) or providing on their own what their child needs to make meaningful progress.

Polk, 853 F.2d at 184.

In *Rowley*, the Supreme Court explicitly held that administrative and court review may not limit analysis of the appropriateness of the IEP to any single criterion. "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." 458 U.S. at 202; *see also Yaris*, 558 F. Supp. at 558. This restraint is as applicable to a specific educational program element, such as whether a child should be provided a structured summer educational experience, as it is to a generalized issue such as the "adequacy of educational benefits conferred upon all children covered by the Act." *Rowley*, 458 U.S. at 202; *see also Crawford*, 708 F.2d at 1034 n. 28 (declining to state whether the "regression-recoupment syndrome" should be used as a test to narrow the class of children to whom a summer program must be offered).

We prefer to adopt the Fifth Circuit's broad premise, as articulated in *Alamo Heights*:

> The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months. This is, of course, a general standard, but it must be applied to the individual by [those drafting and approving the IEP] in the same way that juries apply other general legal standards such as negligence and reasonableness.

790 F.2d at 1158.[3] The analysis of whether the child's level of achievement would be jeopardized by a summer break in his or her structured educational programming should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community.[4]

[3]The *Alamo Heights* case, in which the court found that the child in question should receive a structured summer educational program, resembles the case before the court today in that the testimony concerning the child's regression-recoupment tendencies was directly conflicting: "[T]he School District's employees and consultants were unanimous that they observed no significant regression, while the doctors, therapists, and former teachers who testified on behalf of [the child] all agreed that [the child] required a continuous structured program in order to prevent significant regression." *Id.* at 1159.

[4]We are aware that at least one district court has limited the provision of summer educational programs to those children who can prove irreparable regression. In *Bales v. Clarke*, 523 F. Supp. 1366 (E.D. Va. 1981), the court held that "[p]laintiff is . . . not entitled to year-round schooling without showing an irreparable loss of progress during summer months." *Id.* at 1371. The *Bales* court relied on *Anderson v. Thompson*, 495 F. Supp. 1256, 1266 (E.D. Wis. 1980), *aff'd*, 658 F.2d 1205 (7th Cir. 1981) (affirming district court denial of compensatory damages and attorney's fees).

We disagree with the *Bales* court, not only in its holding under the Act, but also with its implication that *Anderson* supports its conclusion. In *Anderson*, a case involving a child whose diagnosis and proposed educational program were disputed, the district court, without citing any legal authority, declined to order the local school district to provide a summer program because the student's academic regression was not predicted to be more severe than that of a nonhandicapped student. *Id.* at 1266. *Cf. Rettig v. Kent City School Dist.*, 539 F. Supp. 768, 778-79 (N.D. Ohio 1981) (regression standard is appropriately applied; the child whose program was the subject of this case had displayed periods of regression year-round; "[I]f on the basis of a *multi-factored evaluation*, a new IEP for [the child] called for summer school," the school must so provide with state funding) (emphasis added), *aff'd in pertinent part and partially vacated on other grounds*, 720 F.2d 463 (6th Cir. 1983), *cert. denied*, 467 U.S. 1201 (1984).

In so holding, we are mindful of the Supreme Court's caution in *Rowley* that the "appropriate" education required by the Act is not one which is guaranteed to maximize the child's potential. 458 U.S. at 197 n. 21; *accord Polk*, 853 F.2d at 178-79; *Muth v. Central Bucks School Dist.*, 839 F.2d 113, 119 (3d Cir.), *cert. denied*, 109 S. Ct. 103 (1988) (as to local school district defendant and grounds pertinent hereto), and *rev'd*, 109 S. Ct. 2397 (1989) (only as to state as defendant on 11th Amendment immunity grounds).[5] The Act insures, first, that some services are provided to children who previously had received no services at all. 20 U.S.C. § 1412(3); *see, e.g., Rowley*, 458 U.S. at 201 (each child must be provided with a "basic floor of opportunity"); *Polk*, 853 F.2d at 179. Second, it insures that those services which are provided are individualized. 20 U.S.C. § 1412(2)(B). And third, it gives parents the right and obligation to act as the enforcement arm of the entitlement through the procedural safeguards outlined and mandated by the Act. 20 U.S.C. § 1412(5); *Rowley*, 458 U.S. at 205-06; *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 634 (4th Cir. 1985). Congress was mindful of the financial burdens which such expanded

[5]It is important to be careful when using the term "maximization" in the educational setting. For example, the district court in *Bales v. Clarke* wrote as if the phrase " 'maximizing' the plaintiff's educational opportunities" were synonymous with the idealistic goal of " 'maximum educational progress' through the 'best' education available, without regard to costs." 523 F. Supp. at 1371. However, these concepts are not synonymous. The former describes making the best use of the educational program which has been determined to be appropriate for the child, including balancing the needs of the local school district with the resources available to meet those needs. The latter describes the utopian ideal of providing unlimited services to every child, a goal which has been uniformly recognized as unreachable and inappropriate, given the press of needs in our communities. The former is mandated by the Act; the latter is not. Indeed, most professional educators would agree that it is a theoretical as well as a physical and financial impossibility to establish an educational program which "maximizes" each child's educational potential.

services imposed,[6] and was not utopian in its goals.

The State of Oklahoma is a recipient of federal assistance though the Act, and its legislature has enacted a correlative enabling statute, Okla. Stat. tit. 70, § 13-101 (1989 & Supp. 1990)(the Oklahoma statute). The Oklahoma statute includes the provision that, if the child's IEP recommends continuing educational services during the summer, the local school district will be funded to provide a maximum of forty days educational programming during the summer to prevent loss of the educational gains achieved during the nine-month school year.[7]

If state legislation implementing the Act grants a broader entitlement than that found in the federal statute, the state statute defines the parameters of the program which must be extended to children living in that state. *See Board of Educ. v. Diamond*, 808 F.2d 987, 992 (3rd Cir. 1986); *David D. V. Dartmouth School Comm.*, 775 F.2d 411, 417, 420

[6]These financial burdens have offsetting financial benefits. *See Polk*, in which the Third Circuit stated:

> A chief selling point of the Act was that although it is penny dear, it it pound wise — the expensive individualized assistance early in life; geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens.

853 F.2d at 181-82; *accord Rowley*, 458 U.S. at 201 n.23.

[7]Okla. Stat. tit. 70, § 13-101 provides in pertinent part:

> Funds may be expended for school services for an additional period not to exceed forty (40) days during the summer months for approved programs for qualified children, who are severely or profoundly multiple-handicapped, provided their individualized education program (I.E.P.) states the need for a continuing educational experience to prevent loss of educational achievement or basic life skills.

(1st Cir. 1985), (the Act incorporates state substantive law implementing the Act), *cert. denied sub nom. Massachusetts Dept. of Educ. v. David D.*, 475 U.S. 1140 (1986).

However, the Oklahoma statute is not broader than its federal counterpart in its provision for funding for forty days of summer programming under an IEP. The Third, Fifth, Eighth and Eleventh Circuits have all held that under the Act itself, states must provide a continuous educational experience through the summer under the child's IEP if that is the "appropriate" educational experience for the handicapped child's situation. *Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F. 2d 1565, 1576 (11th Cir. 1983), modified on other grounds*, 740 F.2d 902 (1984), *cert. denied*, 469 U.S. 1228 (1985); *Crawford*, 708 F.2d at 1034; *Yaris*, 558 F. Supp. at 559; *Battle*, 629 F.2d at 281. Thus, the federal statute's mandate of a "free appropriate public education," as judicially interpreted, includes the provision for a summer program if appropriate under a child's IEP. It follows that the Oklahoma statute, while assuring local school districts that state funding will cover a forty-day structured educational program during the summer for a child's individualized program, does not expand the federal statute.

To the extent that the Oklahoma statute has been interpreted to require the party attacking the child's proposed IEP to prove that the child has already experienced significant regression with ineffective recoupment of educational or basic life skills, or could be predicted to experience such regression during summer months, in isolation from any other elements which may be important to an individualized assessment of the child's situation, the Oklahoma statute is actually more restrictive than the federal entitlement, rather than more expansive. We cannot reconcile that interpretation with the individualized review demanded by the Act. As an example which is not uncommon, what of the

child who has not shown regression in the past, but for whom other factors, such as acceleration of his or her deficiencies with increased physical maturity, outweigh the lack of past egregious regression? Under the Act, both documentation concerning past regression and predictions of future regression should be considered, an analysis which requires investigation into many aspects of the child's educational, home, and community life.

Turning to the case before us, a thorough review of the entire administrative record reveals it to be focused exclusively on a limited regression-recoupment analysis, which itself is vigorously disputed with opposing competent testimony and evidence.[8] Because of the conflict in evidence concerning Natalie's past regression, other factors, including some or all of those discussed above,[9] should have been considered as part of the evaluation of whether Natalie's IEP is "appropriate" for her individual circumstances. However, there was scant factual development in the record from the administrative proceedings concerning many

[8]This dispute alone, concerning material factual matters, renders inappropriate the district court's grant of summary judgment.

[9]The list of possible factors includes the degree of impairment, the degree of regression suffered by the child, the recovery time from this regression, the ability of the child's parent to provide the educational structure at home, the child's rate of progress, the child's behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with nonhandicapped children, the areas of the child's curriculum which need continuous attention, the child's vocational needs, and whether the requested service is extraordinary for the child's condition, as opposed to an integral part of a program for those with the child's condition. This list is not intended to be exhaustive, nor is it intended that each element would impact planning for each child's IEP.

aspects of Natalie's life.[10] Because the record focuses so completely on only one component of Natalie's education, we do not have sufficient facts to make an informed disposition on the merits of this case, and we therefore express no opinion as to whether the Natalie's IEP is "appropriate" under the Act's mandate. We do hold, however, that those who conducted the administrative review, the administrative appeal, and the federal district court review of that administrative process erred by converting what should have been a multifacted inquiry into application of a single, inflexible criterion.

As to the first issue, therefore, we reverse summary judgment in favor of the schools and remand the case for further proceedings, which should include presentation and consideration of evidence concerning other factors in addition to the regression-recoupment evaluation previously conducted, relevant to a decision as to whether a structured educational summer program should be included as part of Natalie's IEP.

IV.

As to the second issue, whether the CDC is a necessary party to the suit, the hearing officer did not render any

[10] *E.g.*, the record reveals that for at least two summers, 1985 and 1986, Natalie's parents had applied for her participation in the "Laura Dester program," a program run by the Oklahoma Department of Human Services for handicapped children living at home. The program is apparently one of nonprofessionals working with parents in the home during the summer, using the child's IEP for guidance. The record is completely undeveloped as to whether there is any cost to the parents for this program, or why Natalie did not attend it. The record also contains an unexplained school memo to file indicating that a speech pathologist from the Laura Dester program who was assigned to work with Natalie during the summer of 1986 visited her classroom to observe the techniques Natalie's teacher was employing, although in fact Natalie did not attend the program in 1986.

finding or conclusion. The appeals officer found that the CDC was not a necessary party because Natalie's program is the legal responsibility of the local education agency, the Bixby school district, "under state and federal law and regulation." Appeal review decision at 2, 3 (citing the Oklahoma statute and 34 C.F.R. § 506). The magistrate held: "The Children's Developmental Center is not a proper party to this action, being a cooperative effort pursuant to 70 O.S. § 13-101(2)." Report and Recommendation at 19 n.15. The district court found that it did not need to address the issue after it granted the schools' motion for summary judgment.[11]

Section 1415(b)(2) of the Act provides that:

> Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency.

The Oklahoma State Department of Education has designated the "local education agency" as the proper party to respond to a parental request for due process review of a child's placement or program. *See Policies and Procedures Manual for Special Education in Oklahoma* at 53 (1988). By letter to counsel for the Johnsons dated June 5, 1987, the Oklahoma State Department of Education clarified that

[11]On appeal, the schools argue that this issue is not properly before us because Natalie's counsel did not address it in the complaint before the district court. The district court stated that, "The plaintiff has not specifically objected to this conclusion." Order at 4. However, the record reveals that the complaint specifically and repeatedly requested federal court review of this issue. *See, e.g.*, R. Vol. I, tab 1 at 4-7. This comment of the district court was plain error, but the error is harmless under our holding today.

their request for review of Natalie's program must be forwarded to the superintendent of the Bixby Public Schools.

In theory, the CDC could be considered a "local educational agency" under the definitions given in the Act and in the regulations implementing the Act, *see* 20 U.S.C. §§ 1401(a)(8), 1401(a)(22); 34 C.F.R. § 300.8. However, the Act states clearly that the request for due process review is to be made to only one party, which may be designated by the state board of education. 20 U.S.C. § 1415(b)(2) (The "due process hearing . . . shall be conducted by the State educational agency *or* by the local educational agency *or* the intermediate educational unit, *as determined by . . . the State educational agency*.") (emphasis added). The Oklahoma State Board of Education has designated the local school district as the responsible party, consistent with the Act.[12] Thus, the CDC is not a necessary party to this action.

The order of the district court is REVERSED and the matter is REMANDED for further proceedings consistent with this opinion.

[12]At the hearing, the hearing officer sustained the schools' objections to questions about whether any of the seven other children in Natalie's class at the CDC were attending summer programs. The schools' objections were based in part on the fact that the programs for other children were not relevant to Natalie's program, and in part that other students "are not even students this school district has any responsibility for." R. Vol. II, tr. at 103.

Under our holding today, it is clear that the question of what services are regionally available to a child with a particular handicap can be relevant to the evaluation of the schools' responsibility to provide a structured summer educational program. We trust that our intent to encourage broad information gathering during the evaluation process is clear, and that on remand, all relevant information will be included, in an attempt to achieve the balance of individual need and public resources which Congress envisioned.

FILED
JUL -5 1989
JACK C. SILVER, CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 88-C-340-C

NATALIE JOHNSON,
Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 4 OF BIXBY, TULSA COUNTY, OKLAHOMA, et al.,
Defendants.

ORDER

Now before the Court for its consideration is the objection of the defendants, Independent School District No. 4 and the Children's Developmental Center to the Report and Recommendation of the United States Magistrate.[1]

This is an action pursuant to 20 U.S.C. §1415(e)(2), seeking review of the final administrative decision of March 9, 1988, which held that the school district is not required to provide an extended school year for the plaintiff during the summer between the 1987-88 and 1988-89 school years. The

[1]On May 26, 1989, the defendant Department of Education filed its own objection to the Report and Recommendation. Plaintiffs have not had the opportunity to respond to this objection. In view of the Court's conclusions herein, and the impending summer, the Court has not considered the Department of Education's objection.

Magistrate, following a thorough recounting of the facts and procedural history, recommended that defendants be required to provide an extended school year to Natalie Johnson.

20 U.S.C. §1415(3)(2) sets forth the following standard of review:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

The United States Supreme Court has elaborated as follows:

> [T]he provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that §1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.
>
> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982).

70 O.S. §13-101 provides in pertinent part as follows:

> Funds may be expended for school services for an additional period not to exceed forty (40) days during the summer months for approved programs for qualified children, who are severely or profoundly multiple-handicapped, provided their individualized education program (I.E.P.) states the need for a contin-

uing educational experience to prevent loss of educational achievement or basic life skills.

It is the interpretation of this provision, which no Oklahoma appellate court has interpreted, which is determinative of the case at bar.

Most courts in interpreting state statutes have employed the regression/recoupment standard. As described by defendant school district, "these courts focus upon the amount of regression experienced by the child during his or her summer vacation and the amount of time required in the new school year to recoup these lost skills. If the child represses to the extent that lost skills cannot be recouped within a reasonable time, then he or she is eligible for [extended school year]. (Defendant School District's Brief in Support of Objection at 5). *See, e.g., Bales v. Clark*, 523 F.Supp. 1366 (E.D. Va. 1981). The Magistrate concluded that 70 O.S. §13-101 provides a higher standard, calling for a continuing education experience to prevent *any* loss of educational achievement or basic life skills. The Magistrate further concluded that the evidence presented on behalf of the parents at the administrative hearing, e.e., testimony *predicting* that Natalie will suffer regression without a summer program, satisfied the preponderance of the evidence standard of 20 U.S.C. §1415(e)(2). In doing so, the Magistrate gave little weight to the testimony of Natalie's teachers that, based on past summers, Natalie did not suffer any regression which could not be recouped. Specifically the Magistrate found that "while the School District offered *some* testimony, it was directed only to the past, and did not properly embrace the statutory standard." (Report and Recommendation at 15) (footnote omitted).

After careful consideration, The Court cannot adopt this distinction. If a child had never previously experienced a summer without an education program, then necessarily the best possible prediction would have to be made as to

the effect of such a summer. In the case at bar, by contrast, Natalie *has* experienced such summers, and the empirical testimony of her teachers is that she has not significantly regressed. The Court gives greater weight to this testimony than to the largely speculative testimony presented on behalf of Natalie's parents. On the issue before the Court, the number of degrees which a witness possesses is outweighed by direct, day to day observation by another witness. For example, the parents presented the conclusion of social worker Fisher that "without a full calendar year of program [sic], Natalie will regress each summer to a total vegetative dependent level." This speculative conclusion is belied by direct observation of Natalie in previous summers. In sum, the Court has concluded that the defendant School District has complied with the requirements of both federal and state law.

The Court agrees with the Magistrate that the action should not be dismissed as moot. Judicial review of school placement, given the length of time necessary, confronts an issue "capable of repetition yet evading review." *See Bd. of Educ. v. Rowley*, 458 U.S. at 186-87 n.9 (1982).

Further, the Magistrate found that the Children's Developmental Center (where Natalie has been schooled) is not a proper party to this action, based upon 70 O.S. §13-101. (Report and Recommendation at 19 n.15). The plaintiff has not specifically objected to this conclusion. However, in view of the Court's resolution of the matter, this issue need not be addressed.

It is the Order of the Court that the motion of the plaintiffs for summary judgment is hereby DENIED.

It is the further Order of the Court that the motion of the defendants for summary judgement is hereby GRANTED.

IT IS SO ORDERED this 5th day of June, 1989.

/s/ H. DALE COOK
Chief Judge, U.S. District Court

APPEAL REVIEW and/or HEARING DECISION

Case Number: 940

STUDENT'S NAME: Natalie Johnson

DATE OF BIRTH: March 1, 1979

PARENTS' NAME: Jennifer and Fredrick Johnson

PARENTS' REPRESENTATIVE: Tom Price,
Attorney at Law

SCHOOL DISTRICT: Bixby Public Schools

SCHOOL REPRESENTATIVE: John G. Moyer, Jr.,
Attorney at Law

DATES FOR THE:

INITIAL DUE PROCESS HEARING REQUEST:
July 15, 1987

INITIAL DUE PROCESS HEARING:
September 17, 1987

INITIAL HEARING DECISION: December 11, 1987

APPEAL REQUEST: January 14, 1988

APPEAL HEARING:

APPEAL DECISION: March 9, 1988*

*The decision was delayed because the Parents' Attorney failed to meet the time lines as directed.

FORMAL REVIEW:

DATE:

TIME:

LOCATION:

WITNESSES:

PARENTS':

SCHOOL'S:

EVIDENCE:

PARENTS':

SCHOOL'S:

APPEAL OFFICER: Charles R. Davis, Ph.D.

PARTY APPEALING THE INITIAL HEARING DECISION: Parents

ISSUE

The Parents appealed the decision of the Hearing Officer on two points; a summer program and the inclusion of the Cooperative as a party in the appeal process.

The Hearing Officer's decision is supported by the School.

FACTS FROM EVIDENCE AND TESTIMONY RELEVANT TO THE DECISION

See the Hearing Officer's Decision

No additional evidence or testimony was provided for the appeal.

CONCLUSIONS OF LAW

The Hearing Officer cites State law and three federal court cases to provide the legal bases for the decision regarding summer school. Most cases have held that students with handicapping conditions under P.L. 94-142 and Section 504 are entitled to summer programming to prevent regression of progress made during the regular school year. [*Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir. 1980); *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983); *Yaris v. Special School District of St. Louis County*, 728 F.2d 1055 (8th Cir. 1984); and *Bales v. Clarke*, 523 F.Supp. 1366 (E.D.Va. 1981)] The standard for the school's (state's) *responsibility* in regard to summer school has been whether the student can recoup regression occurring during the summer vacation period. The regression concerns previously learned skills and the recoupment must occur within a reasonable period of time upon the beginning of the new school year.

The Local Education Agency (LEA) referred to as the School or School District is the party responsible for the student's education under State and Federal law and regula-

tion. The School has certain options as to how to fulfill this responsibility; but, the responsibility remains that of the LEA. One of the options in serving students under these regulations is through a cooperative. The utilization of a cooperative is not an avenue to insulate the student's program from parent scrutiny. Instead, it is an opportunity to provide an *appropriate* program with all the same parental and state quality control procedures which exist when the program is present within the LEA's unique control. [*Okla. Stat.* tit. 70, Sect. 13-101 (1981); and 34 CFR 506]

DECISION

1. The Hearing Officer's decision is supported without modification.

"The school district is not required to provide an extended school year for the student during the summer between the 1987-88 and 1988-89 school years."

2. The Cooperative is not a necessary party to this hearing.

RATIONALE AND COMMENT

Rationale:

1. The record in this case did not support the need for a summer program to prevent regression.

2. The student's program is the legal responsibility of the LEA.

Comment: The Hearing Officer's statement in Rationale: (2) of the DECISION AND RATIONALE section is emphasized. All parents are encouraged to supplement their children's required education in an effort to maximize the individual child's potential; but, this additional effort is not the School's responsibility.

RELATED CONCERNS

None

PROCEDURAL ERRORS

None

CONCLUDING STATEMENT

The decision of the Appeal Officer is final and binding upon both parents and school. The program should be initiated upon receipt of this document by parent and school.

Any party aggrieved by the findings and decision made in a hearing review has the right to bring a civil action.

/s/ Charles R. Davis, Ph.D.
Appeal Officer

9 March, 1988
Date

Hearing No. 940

HEARING DECISION

PETITIONER

Student's Name	Natalie Johnson
Parents	Jennifer and Fredrick Johnson
Address	8718 E. 134th St. Bixby, OK 74008
Representative	Tom Price Protection and Advocacy Agency 9726 E. 42nd Street Tulsa, OK 74145

RESPONDENT

School District	Bixby Public Schools
Superintendent	W. E. McKinney
Address:	Box 160 Bixby, OK 74008
Representative	John G. Moyer, Jr. Rosenstein, Fist and Ringold 525 South Main Tulsa, OK 74103
Hearing Date	9-17-87
Decision Date	12-11-87

DECISION SUMMARY

The school district is not required to provide an extended school year for the student during the summer between the 1987-88 and 1988-89 school year.

WITNESSES

For the petitioner: 1. Clinical social worker
2. Technical assistance officer
3. Mother of the student

For the respondent: 1. Speech-language pathologist
2. Classroom teacher

DOCUMENTARY EVIDENCE

PE 1	Statement from the clinical social worker; 8-3-87
PE 2	Report of a psychological evaluation; DOE: 5-30-87
PE 3; SE 9	Letter from the clinical social worker to the educational cooperative; 4-30-87
PE 4; SE 4	Letter from a physican to the educational cooperative; 5-7-87
PE 5; SE 3	Letter from a pediatric neurologist to the educational cooperative; 5-14-87
PE 6	Request for due process hearing from the mother to the County Superintendent of Schools; 6-2-87
PE 7	Letter from the technical assistance officer, State Department of Education, to the parent's attorney; 6-5-87
PE 8	Letter from the technical assistance officer, State Department of Education, to parent's attorney; 6-16-87
PE 9; SE 1	Request for due process hearing from the parents to the local education agency; 7-14-87
SE 2	Report of a meeting with the mother by the director of special education; 5-22-87
SE 5	Developmental Center Semester Summary; 5-29-87
SE 6	Statement, occupational therapist; undated
SE 7	Statement, occupational therapist; undated
SE 8	Developmental Center Evaluation; 5-87
SE 10	Review of Placement/I.E.P.; 4-30-87

SE 11	Letter from a supervisor, Department of Human Services to the parents; 4-29-87
SE 12	Report of a conference; 4-29-87
SE 13	Speech and Language Semester Summary; 1986-87
SE 14	Developmental Center Program Plan; 1-21-87
SE 15	Developmental Center Program Plan; 1-20-87
SE 16	Speech and Language Semester Summary; 1-13-87
SE 17	Notes; 1-7-87
SE 18	Individualized Education Program; 1-7-87
SE 19	Review of Placement/I.E.P.; 1-7-87
SE 20	Statement, occupational therapy; undated
SE 21	Developmental Center Semester Summary; 12-19-86
SE 22	Semester Summary for PT/OT; 12-16-86
SE 23	Developmental Center Program Plan; 12-11-86
SE 24	Developmental checklist; undated
SE 25	Developmental Sequence Performance Inventory; 10-86
SE 26	Developmental Sequence Performance Inventory; 9-85, 10-86
SE 27	Semester Summary for PT/OT; 5-23-86
SE 28	Speech and Language Semester Summary; 5-6-86
SE 29	Semester Summary; 5-9-86
SE 30	Semester Summary for PT/OT; 1-9-86
SE 31	Speech and Language Semester Summary; 1-17-86
SE 32	Developmental Center Program Plan; 1-16-86
SE 33	Individualized Education Program; 12-19-85

SE 34	Review of Placement/I.E.P.; 12-19-85
SE 35	Semester Summary; 12-17-85
SE 36	Speech and Language Program Plan; 12-9-85

PROCEDURAL SAFEGUARDS

Prior to the hearing, both parties stipulated that the school system had complied with all aspects of the required procedural safeguards. In addition, the full disclosure requirement was met by the exchange of written evidence and lists of witnesses at least five days prior to the hearing.

The representative for the parents objected to the fact that the local education agency in the student's home district was the sole respondent in this hearing. The student attends an educational cooperative which is administered by the County Superintendent of Schools. The parents' representative contends that the educational cooperative also should be a direct respondent in this case.

ISSUE AND PURPOSE OF THE HEARING

In this issue, the petitioner, parents of the student, contend that the student's educational program should be extended to include a summer program. The school district contends that the student's skills do not appreciably regress during the summer and, therefore, they are not required to provide an extended school year.

FINDINGS OF FACT

1. The student is an eight-year, nine-month-old female who is at least moderately retarded in all skill areas and demonstrates some autistic characteristics. She also presents a seizure disorder which is controlled by medication. (PE 2; PE 5; T 11, 58)

2. The student has been enrolled in a cooperative educational

program since September, 1980. When the student initially was enrolled in this program, the family lived in another school district and the program was continued when the family moved into their present school district approximately two years ago. Both parties agree that the school district is meeting its educational responsibility by educating the student through a cooperative program. (SE 8; T 4, 61, 71)

3. The student's current I.E.P. includes physical therapy, occupational therapy and speech-language treatment in addition to placement in a self-contained class for the multiply handicapped. There is no contact with non-handicapped students. Both parties agree that this placement and the program outlined on the I.E.P. are appropriate for the student. (SE 18; T 4, 62)

4. At the end of the school year, the educational cooperative routinely provides a home program for each student. This program is to be implemented by the families over the summer break. (SD 13; T 93, 95)

For the past four years, the parents independently have enrolled the student in a summer program which is sponsored by a local association for the retarded. This is a recreational program, staffed by non-professional volunteers, which meets daily for six weeks. (T 31-33; 68-69; 80-81)

5. According to the mother, the student needs a structured summer program because "she is just so limited in what she can do" and in order for "her to grow up and do as much as she can as possible [*sic*]" (T 71, lines 24-25 and T 72, line 1). The mother disagrees with the school district's statement that the student has demonstrated no regression. It is her opinion that the student has so few self-help skills and such limited communication ability that regression would be difficult to demonstrate. (T 82)

6. The mother first requested a summer program during an I.E.P. meeting on January 7, 1987. The possibility of an

extended school year specifically was discussed at a conference on April 29, 1987, which was attended by the director of special services of the school district, the classroom teacher, the speech-language pathologist, the occupational therapist, an administrative representative and the mother. According to the mother, all school personnel except the speech-language pathologist agreed that the student did not qualify for an extended school year because she had not demonstrated excessive regression over previous summer breaks. (SE 12; T 72-74)

During the conference, the speech-language pathologist, according to the mother, stated that the student did need speech-language services during the summer, and further, that other conference participants did not disagree with this recommendation. The speech-language pathologist testified that she had stated that summer management would be beneficial for the student. Her concern, however, was related to continuity and follow through and not to the possibility of regression. (T 74-75, 95-96)

7. The speech-language pathologist who worked with the student during the 1985-86 and 1986-87 school years testified that the student did not demonstrate noticeable regression over the 1986 summer break. In May, 1986, the student was using single words and manual signs to communicate and was functioning on approximately the same level in September, 1986. The record contains no objective documentation of these levels. (T 88-90)

The student did not evidence regression over a six week period in early 1986 when the speech-language pathologist was on sick leave. A substitute speech-language pathologist worked with the student and followed a treatment plan written by the regular speech-language pathologist. (T 90, 92)

8. The classroom teacher who worked with the student during the 1985-86 and 1986-87 school years testified that the student had not evidenced regression over summer vaca-

tions. In September, 1986, the student was more aware of her environment and peers than she had been in May, 1986. The teacher has observed the student in non-classroom activities during the present school year. In September, 1987, the teacher noted that the student's behavior was under better control than it had been in May, 1987. The current classroom teacher reportedly has said that the student's abilities to attend and to engage in group activities had improved over the past summer. The record contains no objective documentation of these improvements in behavior. (T 98-100)

9. A clinical social worker stated that the student required a structured summer program in order to "best serve her needs" (PE 1). This program should include classroom instruction as well as speech-language services, physical therapy and occupational therapy. In addition, the student should receive "self-care training . . . social awareness input . . . and would benefit from a special swimming curriculum for overall coordination" (PE 1). Without this program, according to the social worker, the student "will regress each summer to a total vegetative, dependent level" (PE 1). The social worker stressed the need for professional services and stated that a home program would not be sufficient to meet the student's needs. (PE 1; PE 3; SE 9; T 16-17)

The social worker first saw the student and her parents on January 5, 1987. Since that time, she has counseled the parents eight to ten times regarding the management of the student in the home. In addition, she has worked directly with the student five to six times "to establish linkages that have emotional and cognitive aspects to them to see what she remembers from session to session, to see if she will repeat patterns with me, to see if we can increase the vocalization patterns and get a variety of sounds and establish some ways of communication with her . . . " (T 15, lines 14-20). The social worker has noted improvements in these areas. (T 11, 14-15, 25, 28)

The social worker testified that she had not noted regression in the student's abilities from April through August, 1987, and, further, that the parents had not reported any regression. It is her opinion that this lack of regression is directly related to the structured program which the student attended during the summer. (T 31-33)

10. The documentary evidence includes a written statement from the student's pediatrician indicating that she "would benefit from an extended structured program through the summer." (PE 4; SE 4)

11. A pediatric neurologist who has worked with the student submitted a letter recommending an extended school year. Without this, "she would, in all likelihood, regress over the summer." In addition, he stated that a home-based summer program would not adequately address the "self-help skills necessary for maximizing her independence." (PE 5; SE 3)

12. A psychologist who evaluated the student on May 30, 1987, recommended an extended school year because of the student's age and her significant delays. (PE 2)

DECISION AND RATIONALE

Decision: The school district is not required to provide an extended school year for the student during the summer between the 1987-88 and 1988-89 school years.

Rationale: (1) Oklahoma law permits the extension of the school year for students who otherwise would suffer a loss of educational achievement or life skills. (Title 70, Section 13-101) In addition, there are numerous court decisions indicating that, for some students, an extended school year is required in order to provide an appropriate education. In these decisions, an extended school year is required for students who otherwise would demonstrate significant regression during prolonged lapses in educational services and who would not be able to recoup the skills within a

reasonable period of time following the resumption of educational programming. (See *Anderson v. Thompson*, 495 F. Supp. 1256 (1980) and *Bales v. Clark*, 523 F. Supp. 1366 (1981) as well as the citations in the respondent's brief.)

In this issue, the evidence and testimony indicate that the student has not regressed significantly during breaks in educational services. The school district's witnesses indicated that the student's skills remained approximately the same over the past summer and that her attention and behavioral control improved.

The evidence and testimony submitted by the parents does not demonstrate that regression has occurred. The recommendations of the parents' witnesses for an extended school year are based on the possibility of regresssion or on the need to maximize the student's progress. The possibility that regression might occur is not sufficient to require that the school district provide an extended school year.

(2) The parents understandably wish to maximize their daughter's potential and, to this end, have effectively utilized community-based services during past summers. The school district, however, is required to provide only an appropriate program which is reasonably designed to permit a student to benefit from educational services. They are not required to provide an educational program designed to maximize a student's potential. (*Board of Education v. Rowley*, 458 U.S. 176 [1982])

The decision of the hearing officer is binding upon both parties. Either party has the right to appeal this decision by requesting an administrative review. In order to do so, the party must file a written request with the State Department of Education, Special Education Section, within thirty days of the receipt of this decision.

/s/ Rosemary F. Wayte, Ph.D.
Hearing Officer

FILED

JAN -4 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATALIE JOHNSON, a minor who sues by and through FRED and JENNIFER JOHNSON, her father and mother, as next friends,
Plaintiff-Appellant,

v.

INDEPENDENT SCHOOL DISTRICT NO. 4 OF BIXBY, TULSA COUNTY, OKLAHOMA; OKLAHOMA STATE DEPARTMENT OF EDUCATION; CHILDREN'S DEVELOPMENTAL CENTER,
Defendants-Appellees.

JUDGMENT
Entered December 11, 1990

Before HOLLOWAY, MOORE, and BRORBY, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded

to the United States District Court for the Northern District of Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court
ROBERT L. HOECKER, Clerk
/s/ Patrick Fisher
Chief Deputy Clerk

STATUTES AND REGULATIONS

20 U.S.C. § 1401 (1990)

Definitions.

(a) As used in this chapter –

* * *

(18) The term "free appropriate public education" means special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

* * *

20 U.S.C. § 1402 (1990)

Office of Special Education Programs

(a) Establishment; purposes

There shall be, within the Office of Special Education and Rehabilitative Services in the Department of Education, an Office of Special Education Programs

which shall be the principal agency in the Department for administering and carrying out this chapter and other programs and activities concerning the education and training of the handicapped.

* * *

20 U.S.C. § 1412 (1990)

Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

* * *

20 U.S.C. § 1415 (1990)

Procedural safeguards

* * *

(e) Civil action; jurisdiction

* * *

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

* * *

Dean Myers, Ed.D.
Department of Education and Cultural Affairs
Section for Special Education
700 Governors Drive
Pierre, SD 57501

Digest of Inquiry
(July 19, 1989)

• Under the provisions of free appropriate public education (FAPE), should extended school year programs address only those areas in which a student may experience regression?

• Do EHA requirements regarding the placement of children with handicapping conditions in the least restrictive environment (LRE) apply when an Individualized Education Program (IEP) is developed for an extended school year program? Must school districts provide a full range of alternative placements to handicapped children when the district provides extended school year services?

Digest of Response
(August 30, 1989)

No Federal standards for extended year program

The EHA neither establishes standards for extended school year programs nor specifies the circumstances in which an extended school year is needed. However, most state rules focus on addressing regression and recoupment problems, leaving IEP committees to determine the amount of services that the child needs for an extended year program.,

LRE Requirements apply to extended year programs

The LRE requirements at 34 CFR Sections 300.530-300.556 do apply when an IEP is developed for extended school year services, but the EHA does not

address the obligation of school districts to provide a full range of alternative placements to handicapped children when the districts provide extended school year programs. OSEP does not interpret EHA-B to mean that districts must establish extended year programs for nonhandicapped students solely for the purpose of providing integration for all handicapped students in extended year programs, however, LEAs must provide integrated extended year programs when a particular handicapped student's IEP requires interaction with nonhandicapped children.

Text of Response

Thank you for your letter regarding the requirements in Part B of the Education of the Handicapped Act (EHA-B) that apply to extended school year programs for children with handicapping conditions.

You wrote that the State of South Dakota uses the following standard for providing extended school year services:

> Extended year programs are provided for the purposes of minimizing regression of skills and enhancing recoupment of skills when school resumes in the fall.

This standard is not inconsistent with the EHA-B guidelines for extended school year services.

In your letter, you asked if an extended school year program developed for a child with a handicapping condition should address only the areas in which the child may experience regression. The determination about whether a child needs extended school year services in order to receive a free appropriate public education (FAPE) must be made by the participants at the meeting conducted to develop an individualized education program (IEP) for the child. 34 CFR §§ 300.343-300.346. The EHA-B neither establishes standards for extended school year programs nor specifies

the circumstances in which an extended school year is needed. The IEP committee determines the amount of services that the child needs for an appropriate extended school year program. Under most State rules regarding extended school year programs for children with handicaps, the fundamental concern is that the extended school year services be designed to address regression and recoupment problems. It is reasonable that an IEP developed for an extended school year program will differ from the IEP developed for the child's regular school program. It is also reasonable for an extended school year IEP to concentrate on: (1) the areas in which the child may experience regression; or (2) skills or programs that are not academic but are needed so that regression does not occur in academics. (*See* Education for the Handicapped Law Report, Dec. 507:445 (April 18, 1986).)

The additional questions in your letter concern the least restrictive environment (LRE) requirements. You asked whether the EHA-B requirements regarding the placement of children with handicapping conditions in the least restrictive environment are applicable when an IEP is developed for an extended school year program. The LRE requirements at 34 CFR §§ 300.530-300.556 do apply when an IEP is developed for extended school year services, but the EHA-B does not address the obligation of school districts to make a full continuum of alternative placements available to children with handicaps when the school district provides extended school year services. The Department does not interpret the LRE provision to mean that school districts must establish public programs for nonhandicapped children for the sole purpose of being able to implement the LRE provision for children with handicaps who require an extended school year program. However, a school district must meet the LRE requirement by alternative means, such as private placements, when it is determined that a child with

a handicapping condition must have interaction with non-handicapped children. Each child's placement must be based on an IEP. If one placement option, such as a center-based program, is available within a school district, modifications must be made or alternative means of serving a child must be made available when such adjustments are needed to implement a child's IEP.

I hope that this information is helpful. Please let us know if you have any additional questions.

Judy A. Schrag, Ed.D.
Director
Office of Special Education Programs

Dean Myers, Ed.D.
Director
Section for Special Education
Division of Education
Department of Education and Cultural Affairs
700 Governors Drive
Pierre, SD 57501-2291

Digest of Inquiry
[Date Not Provided]

- Must a district make available a full continuum of placements for extended school year (ESY) services?
- When is a district obligated to purchase private placement for ESY services?
- When a public program for ESY services is not available, may a district use federal funds to purchase private placement in a regular educational setting, even though the student is not placed in a regular educational setting during the school year?
- If a district does not operate regular educational programs during the extended school year period, what modifications must the district make to its ESY pro-

grams for disabled students in order to meet the requirements of the least restrictive environment?

Digest of Response
(December 18, 1989)

Placement Options for ESY Services

The availability of a full continuum of placements for ESY services is not required. Under Reg. 300.522(b), however, the district must maintain those placement options for ESY services which are necessary to implement a student's individualized education program (IEP).

Private Placement for ESY Services

A district is not required to establish public programs for ESY services if the district does not offer any public programs for nonhandicapped students during the same time period. A district must purchase private placement for ESY services, however, if no public program is available and the student's IEP requires the ESY services.

Federal Funds Used for Private Placement

Because the purpose of ESY services is to prevent regression and recoupment problems, a student's placement for ESY services may differ from his placement during the school year. Therefore, a district may purchase private placement for ESY services in a regular educational setting as long as the placement meets the student's individualized educational needs. If the private placement is appropriate, then the district may use federal funds to pay for the ESY services.

Modifications to ESY Programs to Ensure LRE

Under Regs. 300.550(b) and 300.552, a student who receives ESY services must be educated in the least restrictive environment. EHA-B does not address a

district's obligation to modify its existing programs in order to ensure LRE. Thus, any modifications must be determined on a case-by-case basis.

Text of Response

I am writing in response to the letter to the Office of Special Education Programs (OSEP) from you and Deb Barnett of your staff. Your inquiry is a followup to our recent letter to you of August 30, 1989 and seeks further clarification of requirements in Part B of the Education of the Handicapped Act (EHA-B) for providing extended school year services (ESY) to children with handicapping conditions.

In paragraph three of your letter, you correctly summarized the responses we provided to you in our August 30, 1989 letter. The four additional questions raised in your present inquiry and OSEP's responses follow:

> Question 1: Since EHA-B does not address a school district's obligation to provide a full continuum of placements, when providing extended school year services, how can the least restrictive environment requirements at 34 CFR §§ 300.550-300.556 apply, which require a full continuum at § 300.551?

Each child who receives a free appropriate public education (FAPE) under EHA-B, including children receiving ESY services, must be educated in the least restrictive setting in which the child's individualized education program (IEP) can be implemented. 34 CFR § 300.550(b); § 300.552. Because ESY services are provided during a period of time when the full continuum of alternative placements is not normally available for any students, the Department does not require States to ensure that a full continuum of placements is available solely for the purpose of providing ESY services. However, EHA-B does require that options on the continuum be made available to the extent necessary to implement a child's IEP. 34 CFR § 300.552(b).

Question 2: What's the distinction between: (a) School districts not being required to establish public programs for nonhandicapped children to meet the least restrictive environment provisions, and (b) School districts being required to purchase private placements when it's determined that interaction with nonhandicapped children is required?

The distinction is that in situation (a), a local educational agency (LEA) is not required to establish public programs for the purpose of providing ESY services if there are no public programs for nonhandicapped children during this time period. Under situation (b), an LEA would have to purchase a private school placement, if there was no available public placement, and the private placement was determined to be necessary to implement an individual child's IEP for ESY services.

Question 3: If interaction with nonhandicapped children is the issue, and the private placements you are suggesting are settings for regular education students, (a) Is a school district required to purchase regular classroom settings from the private section in order to meet the least restrictive environment requirements, (b) What special education/specially designed instruction is being purchased, and (c) Can a school district use Federal special education funds to purchase a regular education program?

Regarding questions 3(a) and 3(b), the LEA is required to purchase private school placements in a regular education setting if they are required to implement a child's IEP. Each child's placement determination must be individualized and based upon the content of the IEP. 34 CFR §§ 300.552(a)(2); 300.346(c). OSEP recognizes that a child's IEP for ESY services will probably differ from the child's regular IEP, *since the purpose of the ESY program is to prevent regression and recoupment problems.* Therefore, the place-

ment needed to implement the child's IEP for ESY services may differ from the child's placement during the regular school year.

Keeping this in mind, regarding question 3(c), if a determination is made that a private school placement is the appropriate placement in which to implement an IEP for ESY services, Federal funds can be used to pay for the services in that situation.

> Question 4: If center-based programs are the only options available within a school district for ESY services, and no regular education services exist during the period extended school year services are being provided, what modification would be required and could be made in the program in order to meet the least restrictive environment requirements?

The EHA-B does not address obligations of school districts to modify existing programs to ensure that a child's IEP for ESY services can be implemented. Instead, such matters are left to the discretion of State and local educational authorities. Therefore, any modifications that are necessary for center-based programming, in order to implement a child's IEP for ESY services, must be determined on a case-by-case basis.

I hope that this information is helpful. Please let us know if we can be of further assistance.

Judy A. Schrag, Ed.D.
Director
Office of Special Education
Programs

Supreme Court, U.S.
FILED
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(2)

No. 90-1421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INDEPENDENT SCHOOL DISTRICT NO. 4 OF TULSA COUNTY, OKLAHOMA
Petitioner,

v.

NATALIE JOHNSON, BY AND THROUGH FRED AND JENNIFER JOHNSON, HER FATHER AND MOTHER, AS NEXT FRIENDS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (FORMERLY TITLED THE EDUCATION FOR ALL HANDICAPPED CHILDREN'S ACT OF 1975), 20 U.S.C. §1400 - 1485 (1990), IS THE DETERMINATION OF WHETHER A QUALIFIED HANDICAPPED CHILD ELIGIBLE FOR AN EXTENDED SCHOOL YEAR BASED SOLELY ON A SINGLE CRITERION OF REGRESSION - RECOUPMENT, OR SHOULD A MULTIFACTED INQUIRY BE MADE?

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No. 90-1421

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

STATEMENT OF CASE

Natalie Johnson is a twelve (12) year old girl suffering from mental retardation, seizures, delayed speech, and autistic traits. She resides with her parents within the boundaries of the Petitioner, Independent School District No. 4 of Tulsa County, Oklahoma. Natalie attends public school at the Children's Developmental Center, a special education cooperative of which the School District is a member. Natalie is classified for special education purposes as a multi-handicapped student.

In September, 1987, an Administrative Due Process Hearing was

pursuant to 20 U.S.C. 1415 (b) (2) to consider a request by Natalie's parents for free extended school year special education program provided by the School District. At the Hearing, the parents presented testimony from a social worker involved with the family, and testimony from Natalie's mother. R. Vol. II, tr. at 58-85, 9-33. Documentary evidence was also presented in the form of written opinions from Natalie's pediatrician, neurologist, and licensed clinical psychologist. R. Vol. II. All agreed Natalie was in need of her structured special education program, and related therapies, during the summer months to prevent regression.

The Due Process Hearing Officer denied the family's request for summer services, stating that Natalie's educational record did not provide evidence of either regression or improvement during the summer. R. Vol. II, Hearing Decision, findings of fact 7, 8. The Hearing Officer's Decision was based on the factual finding no demonstration of actual regression during the summer was presented. The Hearing Officer also held that predictions of future regression are insufficient to require school districts to provide extended school year services to handicapped students.

The family appealed the decision, and the Appeal Officer affirmed the Hearing Officer's Decision, adopting the Hearing Officer's finding of fact. R. Vol. II, Appeal Review Decision.

Natalie's parents then appealed to the United States District Court for the Northern District of Oklahoma. No additional evidence was offered and the matter was referred to a Magistrate. The Magistrate's Report and Recommendation stated the preponderance of the evidence indicated Natalie could be predicted to regress during the summer unless her structured special education program was provided for her. The Magistrate further recommended that the School District be required to provide Natalie such a program.

The District Court disagreed, granting the School District's Motion for Summary Judgment, and denying Natalie's request for an extended school year. The District Court based its decision on the same regression standard used by the Administrative Officers.

Natalie's parents then appealed to the United States Court of

Appeals for the Tenth Circuit. The Court of Appeals reversed and remanded, holding the administrative record did not contain sufficient facts to allow an informed disposition of the case. The Court of Appeals further held those who conducted the Administrative Process, and the District Court, erred by converting what should have been multifacted inquiry into the application of a single, inflexible criterion of a regression - recoupment analysis. Petitioner's Appendix at 17a.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals did not decide a Federal question which conflicts with the decisions of this Court.

The School District in its Petition for Writ of Certiorari claims the Court of Appeals issued an opinion contrary to this Court's decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), said contradiction by virtue of the supposed misapplication by the Court of Appeals of the two-pronged inquiry required under *Rowley*. The School District is required to provide Natalie with a free appropriate public education, 20 U.S.C. §1412(1). In *Rowley*, the Supreme Court held a state meets this requirement by providing personalized instruction with related services to allow a handicapped student the opportunity to benefit educationally from said instruction. *Rowley*, 458 U.S. at 203.

The Court further held that in any review of administrative decisions under 20 U.S.C. 1415(e)(2), a two-pronged inquiry must be had. First, has the state met the requirements of the procedures set forth in the *Individuals with Disabilities Education Act* (formerly the *Education for All Handicapped Children's Act*)? 20 U.S.C. §1400-1485 (1990). Second, is the student's educational program reasonably calculated to enable the child to receive educational benefits? *Rowley*, 458 U.S. at 206.

The procedures component of *Rowley* is not at issue. The make-up of the actual program for Natalie, whether it is reasonably

calculated to provide educational benefits, is at issue.

In holding that a multifacted inquiry must be made concerning the need for an extended school year, the Court of Appeals explicitly relied on *Rowley*. *Rowley* held that administrative and court reviews may not limit analysis of the appropriateness of a program to any single criterion. "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." 458 U.S. at 202. The single use of regression - recoupment as the standard for determining eligibility for an extended school year is exactly what *Rowley* instructs us not to do, the establishment of a single test to determine the adequacy of educational benefits. By holding that consideration of more than one criterion must be used, the Tenth Circuit follows this Court's requirement under *Rowley*.

The School District further attempts to rely on *Rettig v. Kent City School District*, 539 F.Supp. 768 (N.D. Ohio 1981), *aff'd in pertinent part and partial vacated on other grounds*, 720 F.2d 463 (6th Cir. 1983), *cert. denied*, 467 U.S. 1201 (1984). In *Rettig*, a regression standard was found to have been appropriately applied; however, it was held that "if on the basis of a multifactored evaluation, a new IEP for [the child] called for summer school," then the school must so provide (emphasis added). *Rettig* recognizes the requirements of *Rowley* to conduct an inquiry by means of more than a single test, thus the basis of "multifactored."

The Tenth Circuit, in following the requirements of *Rowley*, further relied on *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986). In *Alamo Heights*, the Fifth Circuit explained the regression - recoupment analysis and found it to be an integral part in the process of determining eligibility for summer services. 790 F.2d at 1158. The Fifth Circuit goes on to hold:

> "The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months. This is, of course, a general standard,

> but it must be applied to the individual by [those drafting and approving the IEP] in the same way that juries apply other general legal standards such as negligence and reasonableness." 790 f.2d at 1158

Thus, *Alamo Heights* broadens the class of potentially eligible students for summer services. The Court of Appeals below further makes note that *Alamo Heights* found the child in question should receive a structured summer educational program, and that the case at bar resembles *Alamo Heights* in that testimony about the child's regression - recoupment was directly conflicting between the school employees and the parents' outside professional service providers.

The Court of Appeals discusses other court holding which consider many factors which may constitute an appropriate educational program under *Rowley*. The degree of impairment and the ability of the family to provide educational structure at home, *Battle v. Pennsylvania*, 629 F.2d 269 (3rd Cir.), *on remand*, 513 F.Supp 425 (E.D. Pa. 1980), *cert. denied*, 452 U.S. 968 (1981); the student's rate of progress, behavioral and physical problems, the availability of other resources, interaction with non-handicapped children, the areas of the child's curriculum which need continuous attention, and vocational needs, *Yaris v. Special School District*, 558 F.Supp. 545, 551 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 *(8th Cir. 1984); and whether what is being sought is extraordinary to the child's condition, *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), *cert denied*, 109 S.Ct. 838 (1989). *Polk*, in fact, explicitly rejected the sole use of regression - recoupment to determine eligibility for summer services *Polk*, 853 F.2d at 184

II. The Court of Appeals did not decide an important question of Federal Law which has not been settled by this court.

As the School District's Petition for Writ of Certiorari states, the only question for decision is whether Natalie needs a structured extended school year program to receive educational benefits. The Court of Appeals held that because the administrative and court

reviews below focused so completely on only a single component of her education, regression - recoupment, there are insufficient facts to make an informed disposition of the case. Thus, the second prong of the *Rowley* inquiry, that of determining if the program is reasonably calculated to confer educational benefits, cannot be determined at this stage of the case. This Court's holding in *Rowley* that in reviewing decisions under the Act, both prongs of the inquiry must be satisfied, has not been met and the Court of Appeals was correct in reversing and remanding the case.

CONCLUSION

For the foregoing reasons, Respondent Natalie Johnson respectfully requests the judgement and order of the Court of Appeals below be affirmed, and further, that Petitioner's request for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that three (3) true and correct copies of the above and foregoing **RESPONDENT'S BRIEF** was, on this 10th day of April 1991, mailed, postage pre-paid, to:

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